Supreme Court, U.S.
FILED

96 41 JUL - 8 1996

No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RONALD G. HARRIS and SUSETTE M. HARRIS,
Petitioners

-against-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ronald G. Harris
Susette M. Harris
Appearing *Pro Se*
1507 Mere Dr.
Pinehurst, Texas 77362
(713)356-6844

Solicitor General of the
United States
Room 5614
Department of Justice
10th St. and
Constitution Ave., N.W.
Washington, D.C. 20530
(202)514-3361

(For Further Appearances See Reverse Side of Cover)

Gary R. Allen
Carol A. Bartel
William S. Estabrook
Attorneys
Tax Division
Department of Justice
P.O. Box 502
Washington, D.C. 20044
(202)514-3361

QUESTIONS PRESENTED

1. Is the meaning of the word property as used in 26 U.S.C. Sec. 6321 and 26 U.S.C. Sec. 7403 of the Internal Revenue Code restrained by Article 1, Section 2, Clause 3 and Article 1, section 9, Clause 4 of the United States Constitution so that property means only income producing property and does not include non-income producing property as contended by the IRS, which if the meaning included non-taxable property then the practical effect is a unapportioned direct tax based solely on ownership of property which is repugnant to the Constitution?

2. Was the admission of Form 4340 a violation of the Hearsay Exception Rule 803(8) of the Federal Rules of Evidence and the *Palmer Rule* because it was prepared solely for litigation and not according to law which violated taxpayers' right of confrontation?

3. Was a motion for summary judgment inappropriate in view of the fact that the lower courts did not consider all of the evidence filed by the Defendants rebutting the presumption of trustworthiness of Form 4340 and Form 23C?

4. Are tax court decisions not collectible under the Federal Debt Collection Prodecures Act?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fifth Circuit are those in the caption, except that W. Charles Baltzell, et al was dismissed from this case on January 9, 1990. (R. 113)

TABLES OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Tables of Authorities v

Opinions below 1

Basis for jurisdiction 2

Constitutional, Statutory, and Regulatory Provisions involved 2

Statement of the Case 5

Reasons for granting the writ..... 8

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT THE MEANING OF AN UNDEFINED WORD IN THE INTERNAL REVENUE CODE AND IF THAT MEANING IS LIMITED AND RESTRAINED BY THE CONSTITUTION WITH RESPECT TO THE COLLECTION OF TAXES.....8

II. COURT OF APPEALS DECISION AFFIRMING SUMMARY JUDGMENT BASED UPON FORM 4340 IS IN CONFLICT WITH THE REGULATIONS, STATUTES AND DECISIONS OF THIS COURT THE FIFTH CIRCUIT AND OTHER CIRCUITS.....13

A. Summary judgment based solely upon a single document prepared exclusively for litigation is in direct conflict with the decision in *Palmer* Rule and Fifth Circuit Decisions.....13

B. The Court of Appeals Decision and other court decisions that sanctions the admission of Form 4340 is a departure from the Congressional Intent in 26 U.S.C.§6203.....15

C. Summary judgment is in conflict with the decisions of the Court and Fifth Circuit that require the court to consider all of the evidence on file.....17

III. JUDICIAL FORECLOSURE UPON THE TAX COURT JUDGMENTS ARE IN VIOLATION OF THE FEDERAL DEBT COLLECTION PROCEDURES ACT.....19

V. CONCLUSION 20

TABLES OF AUTHORITIES

Page

Anderson v. Liberty Lobby, Inc.,
106 S.Ct. 2505(1986)..... 17

American Net & Twine Co. v. Worthington,
141 U.S. 468.....13

Bènziger v. U.S., 192 U.S. 38.....13

Brafman v. U.S. 384 F.2d 863(5th Cir. 967).....7, 8

Broadcast Music, Inc. v. Xanthas, Inc.,
855 F.2d 238(5th Cir. 1988).....19

Brushaber v. Union P.R. Co., 240 U.S.....11

Burnet v. Niagra Falls Brewing Co.,
282 US 648 (1931).....13

Celotex v. Catrett, 106 S.Ct. 548(1986).....16

Crooks v. Harrelson, 282 US 55(1930).....13

Doyle v. Mitchell Bros. Co., 247 U.S. 179.....11

Eisner v. Macomber, 252 U.S. 205.....12

Flint v. Stone Tracy Co., 220 U.S. 107.....11

Glass City Bank v. United States,
326 U.S. 265(1945).....9

Gould v. Gould, 245 U.S. 151.....13

Hay's v. Gauley Mountain Coal Co.
247 U.S. 189.....11

Home Ins. Co. v. Rider Corp., 212 F.Supp. 457
(D.N.J. 1963).....9

Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987).....17

In re Atlantic Business and Community Dev. Corp.,
994 F.2d 1071-72(3d Cir. 1993).....9

Metropolitan Nat'l Bank v. United States,
901 F.2d 1297, 1300(5th Cir. 1990).....10

Moss v. Ole South Real Estate, Inc., 933 F.2d 1300,
1305(5th Cir. 1991).....18

Nelson v. U.S., 139 F.2d 162(9th Cir. 1943)
cert denied, 322 U.S. 764(1944).....9

Palmer v. Hoffman, 318 U.S. 109(1943).....passim

Pennington v. Coxe, 6 U.S. 33.....10

Pierce v. Somerset Ry., 171 U.S. 641.....10

Pollack v. Farmers' Loan & Trust Co.,
158 U.S. 601.....11, 12

Rice Investment Co. v. U.S., 625 F.2d 565
(5th Cir. 1980).....9

Ronald G. Harris v. Commissioner,
Docket No. 27041-84.....19

Ronald G. Harris v. Commissioner,
Docket No. 603-82.....19

Sanchez v. U.S., 696 F.2d 213(2d Cir. 1982).....9

Shaffer v. Carter, 252 U.S. 37.....10

Shepard v. Barron, 194 U.S. 553.....10

Simon v. Playboy Elsinore Ass'n, 91-1 USTC ¶ 50,231 (E.D.Pa. 1991).....9

Smietanka v. First Trust & Savings Bank, 257 US 602, (1922).....13

Stanton v. Baltic Mining Co. 240 U.S. 103.....11

Stratton's Independence v. Howbert, 231 U.S. 399....11

Texas Commerce Bank-Forth Worth v. United States, 896 F.2d 152, 161(5th Cir. 1990).....10

Texas Oil & Gas Corp. v. U.S., 466 F.2d 1040 (5th Cir. 1972)cert.denied 410 U.S. 929(1973).....9

U.S. v. Arneson, 74-2 USTC ¶ 9651 (W.D. Wis. 1974).....9

U.S. v. Bess, 357 U.S. 51(1958).....9

U.S. v. Bohrer, 807 F.2d 159 (10th Cir. 1986).....14

U.S. v. Chila, 871 F.2d 1015(11th Cir. 1989).....16

U.S. v. Dixon, 849 F.2d 1478(11th Cir. 1988).....15

U.S. v. Duncan, 919 F.2d 981 (5th Cir. 1990).....18

U.S. v. Hubbell, 323 F.2d 197(5th Cir. 1963).....9

U. S. v. National Bank of Commerce,
472 U.S. 713 (1985).....10

U.S. v. Park Towers, Inc., 8 F.3d 306(5th Cir. 1993).....9

U.S. v. Puente, 826 F.2d 1415 (5th Cir. 1987).....14

U.S. v. Quezada, 754 F.2d 1190(5th Cir. 1985).....14

U.S. v. Rye, 550 F.2d 682(1st Cir. 1977).....9

U.S. v. Stone, 604 F.2d 922 (5th Cir. 1974).....14

United States v. Wigglesworth, 2 Story, 369,
Fed. Cases No. 16,690.....12

U.S. v. Williams, 661 F.2d 528(5th Cir. 1981).....15

Urban Indus. Inc. v. Thevis, 670 F.2d 981
(11th Cir. 1982).....9

CONSTITUTION, STATUTES, REGULATIONS AND RULES

U. S. Const. Article I, Sec. 2, Clause 3.....2, 12

U. S. Const. Article I, Sec. 8, Clause 1.....2, 10

U. S. Const. Article I, Sec. 9, Clause 4.....2, 12

U. S.Const. Amendment XVI.....2, 10

26 U.S.C. § 6321.....2, 8

26 U.S.C. § 7403.....3

26 U.S.C. § 6203.....3, 15, 16

26 C.F.R. § 301.6203-1.....3, 7, 8,16

28 U.S.C. § 3002(2).....5, 19

28 U.S.C. § 3002(8).....5, 19

Rule 56 of the Federal Rules of Civil Pro.....4, 16

Rule 803(8) Federal Rules of Evidence.....4, 14, 17

LEGISLATIVE HISTORY SOURCES

H.R. No.1337, 83rd Congress, reprinted in
U.S. Cong. & Admins. News,1954, Vol. 3,
4552.....16

S.R No.1622, 83rd Congress, reprinted in
U.S. Cong. & Admins. News,1954, Vol. 3,
5221.....16

No.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RONALD G. HARRIS and SUSETTE M. HARRIS,
Petitioners

-against-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners herein respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on March 12, 1996 and petition for rehearing denied April 9, 1996.

OPINIONS BELOW

Magistrate Frances Stacy denied Petitioners' Motion to Dismiss for Failure to State a Claim and Lack of Jurisdiction October 1, 1990. The district court granted motion for summary judgment on November 13, 1991. Amended Final Judgment was entered May 7, 1993. The Fifth Circuit affirmed the judgment on March 12, 1996 and petition for rehearing denied on April 9, 1996.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered April 9, 1996. This court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Article I, Sec. 2, Clause 3:

> Representatives and direct taxes shall be apportioned among the several states which may be included within this Union..

United States Constitution, Article I, Sec. 8, Clause 1:

> The Congress shall have power to lay and collect taxes...

United States Constitution, Article I, Sec. 9, Clause 4:

> No capitation, or other direct , tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

United States Constitution, Amendment XVI:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

26 U.S.C. § 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any cost that may accrue in addition thereto) shall be a lien in favor of the United states upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 7403. Action to enforce lien or subject property to payment of tax.

(a)Filing.-In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the attorney general or his delegate, at the request of the secretary, may direct a civil action to be filed in a district court of the United states to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

26 U.S.C. § 6203. Method of Assessment.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules and regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment.

26 C.F.R. § 301.6203-1 Method of assessment.

The district director and the director shall appoint one or more assessment officers. The district director shall also appoint assessment

officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, that character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If a taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amount assessed.

Federal Rules of Civil Pro.Rule 56. Summary Judgment

(c)Motion and Proceedings Thereon.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (in part)

Federal Rules of Evidence 803(8). Public Records and Reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting

forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness.

28 U.S.C. § 3002(2):

"Court" means any court created by the Congress of the United States, excluding the United States Tax Court.

28 U.S.C. § 3002(8):

"Judgment" means a judgment, order, or decree entered in favor of the United States in a court and arising from a civil or criminal proceeding regarding a debt.

STATEMENT OF THE CASE

I

This case originated upon the filing of a complaint by the United States to enforce the income tax liens of the United States pursuant to the Internal Revenue Code. The complaint alleged that income taxes were assessed for tax years 1978, 1979, 1980, 1981 and 1982 against Petitioners. The complaint seeks to foreclose upon the right of the Petitioners' real property nominally called Tract A and Tract B in the complaint

Petitioners raised a federal question in their Motions to Dismiss the Complaint for for lack of jurisdiction (R. 169)[1]and Failure to State a Claim upon which relief can be granted(R. 199). A Rule 16 conference was held in which Petitioners' motions were considered. Petitioners argued that "the government has failed to state a claim in the Complaint that Tract A and B produced any income from which the alleged tax arose."

In oral argument, Petitioner Susette M. Harris argued that failure to show a nexus between any income produced and property sought to be seized, means that the Government has no claim or jurisdiction over the property.

> "Well, I would just like to conclude in saying that without a showing of--that the property sought to be seized, without the Plaintiff or the government in this case showing there was any income produced, then there is no--there is not in rem jurisdiction, and there are no presumptions in favor of federal jurisdiction." (Excerpt from Hearing of September 21, 1990, Page 7, line 19.)

Magistrate Frances Stacy denied these motion on October 1,1990.[1a][2]

The government did admit that Tract A and Tract B did *not* appear to have produced the income which caused the tax liability.(Appellants'Record Excerpts (i) & (j)). Additionally, the record is void of any evidence that indicates that Tract A and Tract B are/or were income producing properties.

In the government's complaint and motion for summary judgment, the sole basis for foreclosing upon Petitioners' right to Tract A and Tract B is ownership of

---

[1] References to the original record will be indicated as (____).
[2] Material appearing in the Appendix to this petition will be referred to as ["___a"].

property. This is in direct conflict with the Constitutional restraint that tax collection based solely upon ownership of property shall be apportioned.

Petitioners argued, *inter alia*, against the motion for summary judgment against Tract A and B because of the non-productive status of the property (R. 489, 501).

II

A motion for summary judgment was granted in favor of the government[2-10]. The district court considered only Form 4340 as evidence of a tax assessment(R. 236-249 for Susette M. Harris and 221-235 for Ronald G. Harris)[5a, 9a]

Petitioners motion to dismiss timely challenged the presumption of reliability and truthfulness of Form 4340 in proving an income tax assessment (R. 553). However, the district court failed to rule on Petitioners' motion to dismiss and exhibits. The district court considered only Docket Instrument #32 and #33 in granting motion for summary judgment[2a].

Petitioners' entered into evidence Form 23C which the government provided and claimed was the actual Summary Record of Assessment (R.392-440 for Susette M. Harris and 331-390 for Ronald G. Harris). The material fact of an assessment made according to law is necessary to maintain a cause of action against a taxpayer.

Form 4340 is not the form that is necessary to maintain this cause of action because it was not made pursuant 26 C.F.R. § 301.6203-1. Form 4340 is not signed by an assessment officer. Form 4340 purports to be a transcript of Form 23C.

The district court erroneously relied on *Brafman v. U.S.* 384 F.2d 863 in allowing Form 4340[6a]. *Brafman* does not involve a Form 4340 . The *Brafman* case turns on an unsigned Summary Record of Assessment, Form 23C as being invalid and therefore not conclusive of an assessment.

However, our contention is that an unnamed Summary Record of Assessment is equally invalid under *Brafman.* The Summary Record of Assessment produced by the IRS is void of the identification of the taxpayer and the tax year in question. We believe that *Brafman* is relevant to our position in that a Form 23C that does not identify the taxpayer and tax year in question is as equally invalid as an unsigned Form 23C.

The gross discrepancies between the two forms is the basis for this petition because of the inconsistencies in other circuits regarding the assessment of taxes.

Furthermore, the court of appeals affirmed summary judgment which was decided solely on a document prepared exclusively for litigation in violation of the *Palmer Rule* and not made in accordance with Treasury Regulation 301.6203-1. A petition for rehearing this argument was denied.[17a]

Thus, this petition will present two main contentions: the error of law in expanding the meaning "property" as used in the Internal Revenue Code to include non-source property; and the error of law in relying on Form 4340 as legal evidence of a tax assessment.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT THE MEANING OF AN UNDEFINED WORD IN THE INTERNAL REVENUE CODE AND IF THAT MEANING IS LIMITED AND RESTRAINED BY THE CONSTITUTION WITH RESPECT TO THE COLLECTION OF TAXES.

This case involves a true "constitutional moment." This conflict involves an important question of the meaning of the word "property" as used in the Internal Revenue Code. The Court has not interpreted the meaning of the word

"property" in Sec. 6321 with respect to non-productive property. Indeed, the government agrees that no court case exist involving the question and the facts in this case. The government states regarding Sec. 6321 and non-productive property: "Taxpayers do not cite, nor has the government found, any case which so limits the clear language of the statute."(Br. 25)

The question presented is not an attack on the constitutionality of any Internal Revenue Code sections using the word "property" in an undefined manner. The attack is the manner in which the term "property" is being interpreted by the Internal Revenue Service.

The question is not resolved by any of the cases presented by the government in their brief on appeal.[3] A close and careful examination of each and every case submitted by the government will reveal that the taxpayer did not challenge the collection of a income tax liability on non-

---

[3] The following cases relied upon by the government have no relevance here due to different holdings on the facts, law and arguments presented: *U.S. v. Park Towers, Inc.*, 8 F.3d 306, 310(5th Cir. 1993); *In re Atlantic Business and Community Dev. Corp.*, 994 F.2d 1071-72(3d Cir. 1993); *U.S. v. Bess*, 357 U.S. 51(1958)(state law property rights); *Sanchez v. U.S.*, 696 F.2d 213(2d Cir. 1982)(state law property rights); *Urban Indus. Inc. v. Thevis*, 670 F.2d 981(11th Cir. 1982)(exempt property); *U.S. v. Rye*, 550 F.2d 682(1st Cir. 1977)(state law property rights); *Texas Oil & Gas Corp. v. U.S.*, 466 F.2d 1040(5th Cir. 1972)cert.denied 410 U.S. 929(1973)(accounts receivable); *U.S. v. Hubbell*, 323 F.2d 197(5th Cir. 1963)(unliquidated tort claim); *Simon v. Playboy Elsinore Ass'n*, 91-1 USTC ¶ 50,231 (E.D.Pa. 1991)(personal injury settlement); *U.S. v. Arneson*, 74-2 USTC ¶ 9651(W.D. Wis. 1974)(right to legacy); *Rice Investment Co. v. U.S.*, 625 F.2d 565, 568(5th Cir. 1980(after acquired inventory); *Nelson v. U.S.*, 139 F.2d 162(9th Cir. 1943) cert denied, 322 U.S. 764(1944)(after acquired property); *Home Ins. Co. v. Rider Corp.*, 212 F.Supp. 457(D.N.J. 1963)(after acquired property).

productive property or the facts did not warrant such an argument. Most of these cases involved the perfection of the lien under §6323 and the *first in time is the first in right* doctrine and/or the issue of state-law property rights. Moreover, the question was never asked in the cases submitted by the government because the facts did not exist or the taxpayer waived the constitutional right regarding collection of his non-taxable property. *Shepard v. Barron*, 194 U.S. 553, 49 L.Ed. 1115, 24 S. Ct. Rep. 737; *Pierce v. Somerset Ry.*, 171 U.S. 641, 43 L.Ed. 316, 19 S.Ct.Rep. 64.

The government relies on *Glass City Bank v. United States*, 326 U.S. 265, 267(1945) which involved a question of after-acquired income. The questions presented *United States v. National Bank of Commerce*, 472 U.S. 713, 719(1985) involving §6332(c)(1) is irrelevant. *Metropolitan Nat'l Bank v. United States*, 901 F.2d 1297, 1300(5th Cir. 1990), *Texas Commerce Bank-Forth Worth v. United States*, 896 F.2d 152, 161(5th Cir. 1990) clearly involve disputes over after acquired income and state law property rights that are federally defined.

The question was asked in *Shaffer v. Carter*, 252 U.S. 37, but the Court declined to answer the question because the facts clearly indicated that the taxpayer's property subject to the lien had produced the income. The Court concluded that "it is evident that the lien will rest upon the same property interests which were the source of the income upon which the tax was imposed." *Shaffer*, supra at 59.

The Constitution grants Congress the power to "lay and collect taxes" at Article I, Sec. 8, Clause 1. The Sixteenth Amendment declares that "Congress shall have power to lay and collect taxes on incomes from, from whatever source derived." These two charges to Congress, "lay and collect", are conjoined and inseparable. In *Pennington v. Coxe*, 6 U.S. 33 the Court regarding an internal revenue tax, found that "'There shall be levied, collected and paid, &c.' Each of these words implies a charge upon the article..." In that case,

the Court found that the article subject to taxation is charged with laying, collecting and paying the tax. However, the government believes taxation is constitutionally separate from collection.[4]

The doctrine of *pari materia* applies in that the Sixteenth Amendment grants Congress the power to lay and collect taxes on incomes from whatever source derived. The Amendment does not say "Congress shall have power to lay taxes on incomes and collect taxes from non-incomes."

Direct taxes are taxes collected solely by reason of ownership of property.[5] The Court has consistently held that taxes imposed solely by reason of ownership are direct taxes and must be apportioned. The language of the Constitution clearly does not grant the IRS the power to convert an indirect tax into a direct tax upon collection of said tax. "Direct taxation was not restricted in one breath, and the restriction blown to the winds in another." *Pollack v. Farmers' Loan & T. Co.*, 158 U.S. 601 at 622. In collecting income taxes the IRS cannot disregard the clear and unambiguous limitations of the Constitution. The power to lay and collect taxes is still limited and defined by the Constitution at above mentioned Articles and:

---

[4] "Taxpayers appear to confuse taxation with collection." (Br. 23, n. 7)

[5] *Pollack v. Farmers' Loan & T. Co.*, 158 U.S. 601, 637, 39 L.Ed. 1108, 1125, 15 S.Ct.Rep. 912; *Brushaber v. Union P.R. Co.*, 240 U.S. 1, 18, 19, 60 L.Ed. 493, 501,502, 36 S.Ct.Rep. 236; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 55 L.Ed. 389, 31 S.Ct.Rep. 342; *Stratton's Independence v. Howbert*, 231 U.S. 399, 58 L.Ed. 285, 34 S.Ct.Rep. 136, *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 182, 183, 62 L.Ed. 1054, 1058, 1059, 38 S.Ct.Rep. 467, *Hay's v. Gauley Mountain Coal Co.* 247 U.S. 189, 191, 192, 62 L.Ed. 1061-1063, 38 S.Ct.Rep. 470; *Stanton v. Baltic Mining Co.* 240 U.S. 103, 60 L.Ed. 546, 36 S.Ct.Rep. 278.

> "The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. *Eisner v. Macomber*, 252 U.S. at 205.

At issue here is the fundamental right of property as guaranteed by the Constitution and the guarantee that direct taxes will not be collected except by the rule of apportionment. To insure the guarantee, the meaning of "property" must be limited by the provisions of the Constitution that require direct taxes to be apportioned in Article I, Sec. 2, Clause 3 and Article I, Sec. 9, Clause 4.

> "The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration." *Pollack*, supra at 621.

In other words, "property" means income producing property owned by the taxpayer. These provisions are not to be repealed or modified by a loose construction of the word "property". Congress has not legislated a definition for "property" or "income" because:

> "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which it alone derives its power to legislate, and within those limitations alone that power can be lawfully exercised." *Eisner v. Macomber*, 252 U.S. 189, 206.

The definition of these words must be interpreted according to "truth and substance, without regard to form." *Eisner*, supra at 206.

The term "property" cannot be defined by Congress because to do so may result in an alteration the two great classes of taxes and their respective limitations and modes of execution.

Furthermore, to prevent arbitrary and capricious collection of an income tax, the meaning of the term property must be limited to incomes and sources of incomes. Any definition that includes non-productive property would allow the tax collector to choose the order in which he levies property. The collector could choose to levy non-productive property A prior to income producing property B, leaving the taxpayer with no right to insist that the productive property be levied first. This is anathema to the concept of law and order.

Where there is reasonable doubt of the meaning of a revenue term, the doubt is to be resolved in favor of those taxed.[6] In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication beyond the clear import of the language used, or to embrace matters not specifically pointed out. In most cases of doubt they are construed most strongly against the government, and in favor of the citizen. *Gould v. Gould*, 245 U.S. 151, 62 L.Ed. 211.[7]

II. THE COURT OF APPEALS DECISION AFFIRMING SUMMARY JUDGMENT BASED UPON FORM 4340 IS IN CONFLICT WITH THE REGULATIONS, STATUTES AND DECISIONS OF THIS COURT THE FIFTH CIRCUIT AND OTHER CIRCUITS.

A. Summary judgment based solely upon a single document prepared exclusively for litigation is in

---

[6] *Smietanka v. First Trust & Savings Bank*, 257 US 602, 66 Led. 391, 42 S.Ct. 223(1922); *Crooks v. Harrelson*, 282 US 55, 75 L.Ed. 156, 51 S.Ct. 49(1930); *Burnet v. Niagra Falls Brewing Co.*, 282 US 648. 75 L. Ed. 594, 51 S.Ct. 262(1931)

[7] *United States v. Wigglesworth*, 2 Story, 369, Fed. Cases No. 16,690; *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 35 L.Ed. 821, 824, 12 Sup. Ct. Rep. 55; *Benziger v. U.S.*, 192 U.S. 38, 55, 48 L.Ed. 331, 338, 24 Sup. Ct. Rep. 189.

direct conflict with the decision in *Palmer* v. *Hoffman* and Fifth Circuit Decisions.

The court of appeals erred in affirming the government's summary judgment based solely upon Form 4340 which was prepared exclusively for litigation. Form 4340 was a transcript prepared on February 13, 1990, seven months after the filing of the complaint on July 31, 1989.

The district court Memorandum and Order concludes that the assessments were "duly documented" by the submission of Form 4340.[8a] The district court did not rely on any other documentation to prove a valid tax assessment.

The court of appeals decision is in direct conflict with the decision in *Palmer v. Hoffman*, 318 U.S. 109, 113-115, 63 S.Ct. 477, 480-481, 87 L.Ed. 645(1943). The Court found in construing the statutory predecessor of Rule 803(8) that:

> "there is nothing in the in the background of the law on which this Act was built or its legislative history which suggest for a moment that the business of preparing cases for trial should be included."

The decision is also in conflict with *U.S. v. Bohrer*, 807 F.2d 159, 162-163(10th Cir. 1986) which held that an IRS "contact card" was inadmissible because it had been maintained for the purpose of litigation.

The Fifth Circuit has held that "the relevant inquiry under Rule 803(8) is whether the information was recorded by a public official as part of a routine procedure in a non-adversarial setting." *U.S. v. Puente*, 826 F.2d 1415, 1418(5th Cir. 1987). Form 4340 fails to meet this standard because if was prepared exclusively for trial.

In *U.S. v. Quezada*, 754 F.2d 1190, 1194(5th Cir. 1985) the court stated that "This circuit has recognized that Rule 803(8) is designed to permit the admission into evidence of public records prepared for purposes independent of specific litigation." Also in *U.S. v. Stone*, 604 F.2d 922, 925(5th Cir. 1974) the court rejected use of a special affidavit

prepared for litigation because it violates the hearsay exception rule and the right of confrontation. The Court said that the:

> "hearsay exception rule[Fed. R.Evid. (803)(A)] is designed to allow admission of officials records and reports prepared by an agency or government office for purposes independent of specific litigation..."

Verified statement made three years after incident in question and for the purpose of trial are not admissible under hearsay exception rule. *U.S. v. Williams*, 661 F.2d 528, 531(5th Cir. 1981)

Taxpayers are denied the substantial right of confrontation judicially and administratively when summary judgment is granted based on documents prepared solely for litigation.

The *Palmer* Rule protects that right by excluding litigation documents from the hearsay exception rule. The document that the district court claims "duly documents" a tax assessment was not executed at the time the taxes were assessed. No administrative proceeding or hearing between the IRS and the taxpayer could have taken place regarding this form and the information therein because it was prepared after the complaint was filed.

B. The Court of Appeals Decision and other court decisions that sanctions the admission of Form 4340 is a departure from the Congressional Intent in 26 U.S.C. §6203.

In *U.S. v. Dixon*, 849 F.2d 1478(11th Cir. 1988) the taxpayer claimed that the absence of Form 23C prevented the assessment from being valid. The court held that supplying a Certificates of Assessments and Payments was sufficient evidence that Form 23C had been signed. The court affirmed a summary judgment upon Form 4340 "given that the defendant has produced no evidence to counter this presumption." 672 F.Supp. at 506 affirmed at 849 F.2d 1478.

In *U.S. v. Chila*, 871 F.2d 1015(11th Cir. 1989) the same court held that the IRS clearly met the requirements of the statute "that the summary record(Form 23C) through [the] supporting records," a certificate of Assessments and Payments and the Account Card, provided all the information called for in the statute, i.e., identification of the taxpayer, the character of the liability assessed, the taxable period, and date and amount of the assessment. The court relied on the part of the regulation that requires the government to submit only the "pertinent parts of the assessment."

These decisions are in conflict with the Congressional intent at 26 U.S.C. §6203 that requires that the Secretary furnish to the taxpayer a copy of the record of assessment. See H.R. No.1337, 83rd Congress, reprinted in U.S. Cong. & Admins. News,1954, Vol. 3, 4552 and S.R No.1622, 83rd Congress, reprinted in U.S. Cong. & Admins. News,1954, Vol. 3, 5221.

Congress intends that the assessment be summarized on one record and that, upon request of the taxpayer, the IRS shall provide a copy of the record. Section 6203 does not say that only the "pertinent parts of the record" shall be provided. The treasury regulation, in part, is in direct conflict with the §6203 and congressional intent. The lower courts reliance on this conflict has led to the admission of evidence of an assessment in a piecemeal fashion. The IRS is allowed to submit various documents containing "pertinent parts" that are not executed under authority of §6203 and T.R. 301.6203-1. The taxpayer then has to overcome the presumptions associated with these documents which are not made according to authority of public law and submitted in a labyrinthine manner.

This conflict needs to be resolved to maintain consistency in the admission of evidence to prove a tax assessment.

C. Summary judgment is in conflict with the decisions of the Court and Fifth Circuit that require the court to consider all of the evidence on file.

Summary judgment is inappropriate if the court fails to consider all of the pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits if any, that show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. Rule. Civ. P.56(c).

Once the movant carries the burden of informing the court of the basis for its motion, the burden shifts to the non-movant to show that a summary judgment should not be granted. *Celotex v. Catrett*, 106 S.Ct. 2548-53(1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2514(1986)

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson*, 106 S.Ct. at 2513. Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565, 567(5th Cir. 1987).

The material fact necessary to grant summary judgment in this case is proof of a tax assessment made according to law. Petitioners challenged the presumption of truthfulness and reliability of Form 4340 with the filing of Form 23C, Summary Record of Assessment. The district court and Court of Appeals failure to consider Petitioners' motion to dismiss and exhibits is in direct conflict with *Anderson* and *Honore*, supra.

If the lower courts had examined Form 23C they would have found glaring omissions of pertinent facts such as the identity of the taxpayer and tax year(R. 331-390; 392-440). A reasonable person would have concluded that Form 23C is insufficient and therefore unreliable as evidence of an assessment. Therefore, Form 4340 is not a true and complete

transcript of 23C. These forms would be inadmissible as evidence of the material fact of an assessment.

Therefore, summary judgment was inappropriate and in violation of substantive evidentiary burden regarding trustworthiness.

The Fifth Circuit reiterated four factors necessary to determine trustworthiness of public records submitted pursuant to Rule 803(8)(B) and (C). In *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1305(5th Cir. 1991), the Fifth Circuit stated :

> "[T]he advisory committee proposed a non-exclusive list of four factors which are helpful in determining trustworthiness: (1) the timeliness of the investigation; (2) special skill or expertise of the official; (3) whether a hearing was held and at what level; and (4) possible motivational problems in Palmer v. Hoffman."

These factors help lead the court to a conclusion that the information can be relied upon.

The admission of Form 4340 is not reliable evidence based upon the following facts:

1) certified many years after the alleged dates of assessment;
2) no hearing was held administratively or judicially;
3) and was prepared for exclusively for this trial.

This document does not "possess circumstantial guarantees of trustworthiness to justify its admission as evidence." *Moss*, supra at 1305.

The court of appeals clearly departed from the established rules of evidence in ascertaining trustworthiness. In *U.S. v. Duncan*, 919 F.2d 981, 986(5th Cir. 1990) the court said that "The primary emphasis of rule 803(6) is on

reliability or trustworthiness of the records sought to be introduced."

The record clearly shows that Form 4340 is untrustworthy as evidence of a tax assessment. *Broadcast Music, Inc. v. Xanthas, Inc.,* 855 F.2d 238-239(5th Cir. 1988)(looking at reliability in the processes of compiling the evidence in determining whether evidence is trustworthy)

The Fifth Circuit has departed from the established rules of evidence in allowing Form 4340, Certificates of Assessments and Payments while disregarding Form 23C, Summary Record of Assessment. This departure results in a violation of the Petitioners' right to have all of the evidence considered when granting a motion for summary judgment.

III. JUDICIAL FORECLOSURE UPON THE TAX COURT JUDGMENTS ARE IN VIOLATION OF THE FEDERAL DEBT COLLECTION PROCEDURES ACT.

The government contends that the judicial collection of the Amended Final Judgment is governed by the Federal Debt Collection Procedures Act, 28 U.S.C. §3001 et.seq. Petitioners argued that tax court judgments are not recoverable pursuant to the Federal Debt Collection Procedures Act.

Tax court judgments are excluded from judicial recovery because the the term "Court" means any court excluding a United States Tax Court. 28 U.S.C. §3002(2). The term "judgment' means a judgment, order, or decree entered in favor of the United States in a court(except a United States Tax Court). 28 U.S.C. §3002(8).

The Amended Final Judgment must exclude 1978, 1979, and 1982 because these are United States Court judgments and are not recoverable pursuant to the Federal Debt Collection Procedures Act. Ronald G. Harris, v. Commissioner, Docket No. 603-82 and Ronald G. Harris v.

Commissioner, 27041-84 must be remanded to the IRS for administrative collection.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Susette M. Harris
1507 Mere Dr.
Pinehurst, Texas 77362
(713)356-6844

Ronald G. Harris
1507 Mere Dr.
Pinehurst, Texas 77362
(713)356-6844

No.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RONALD G. HARRIS and SUSETTE M. HARRIS,
Petitioners

-against-

UNITED STATES OF AMERICA,
Respondent.

Appendix

Contents:

1a.) Order of Magistrate Stacy of October 1, 1990.

2a.) Memorandum and Order granting motion for Summary judgment entered November 18, 1991.

10a.) Amended Final Judgment entered May 7, 1993.

15a.) Fifth Circuit Per Curiam affirmation of Amended Final Judgment on March 12, 1996.

16a.) Fifth Circuit petition for rehearing denied April 9, 1996.

Appendix

1

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)
	)
	)
VS.	)
	) CIVIL ACTION
	) NO. H-89-2543
W.CHARLES BALTZELL AND	)
J.W. SMELLEY, A PARTNERSHIP;	)
ABC LAND & DEVELOPMENT CO, INC;	)
RONALD G. HARRIS, INDIVIDUALLY;	)
SUSETTE M. HARRIS, INDIVIDUALLY;	)
RONALD G. HARRIS AND SUSETTE M.	)
HARRIS AS NATURAL GUARDIANS OF	)
THEIR MINOR CHILDREN ERIN LEIGH	)
HARRIS AND REBEKAH ANN HARRIS,	)
DEFENDANTS.	)

ORDER

For good cause shown Defendants Ronald G. Harris and Susette M. Harris' Motion to Dismiss for lack of Jurisdiction, Instrument #19 and Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, Instrument #21, are DENIED.

The Clerk of the Court shall provide a true copy of this Order to all counsel of record.

Signed at Houston, Texas, this the 24th day of September, 1990.

Frances H. Stacy
United States Magistrate

Appendix
2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	
V.	)	CIVIL ACTION
	)	No.H-89-2543
RONALD G. HARRIS and SUSETTE M. HARRIS, DEFENDANTS.	)	

MEMORANDUM AND ORDER

Today, the Plaintiff's Motion for Full or Partial Summary Judgment(docket instrument #28), Memorandum of Law in Support of the Motion for Full or Partial Summary Judgment(docket instrument #29), Defendant's Response in Opposition to Motion for Full or Partial Summary Judgment(docket instrument #32), and Memorandum of Law in Support of Defendant's Response for Full or Partial Summary Judgment(docket instrument #33) came on for ruling before this Court. For reasons articulated below, this Court finds that the Motion for Summary Judgment should be granted.

FACTUAL BACKGROUND

Ronald G. Harris and Susette M. Harris ("Harrises") were assessed for federal income taxes for the taxable years 1978, 1979, 1980, 1981 and 1982. Despite Notice and Demand, they owe an unpaid balance of assessed taxes, interest and penalties to the Internal Revenue Service(IRS) for the years 1978, 1979, 1980, 1981 and 1982.

As a result of the unpaid balance owed to the IRS because of unpaid taxes, federal tax liens arose on all property or interest in property of Ronald G. Harris or Susette M. Harris in favor of the IRS as of the date of assessment of the taxes mentioned above. This lien was to secure payment of tax, interest and penalties and costs which may accrue.

The IRS filed notices of Federal Tax Liens, and are seeking the enforcement of these liens against real property (Tract A and Tract B) to pay the unpaid federal tax liabilities of Ronald G. and Susette M. Harris.

The Harrises purchased tracts A and B in 1975 and 1978 respectively. They received warranty deeds to Tract A and B, but neither deeds were recorded. Yet, on May 22, 1986, they signed a quitclaim deed purporting to transfer all their rights, title and interest in both properties to their two minor children Erin Leigh Harris and Rebekah Ann Harris for the sum of $1.00.

STANDARD OF REVIEW

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553(1986). The moving party has

the burden of showing that there is not genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Williams v. Adams, 836 F.2d 958, 960(5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222(5th Cir. 1987). A defendants who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. Id.

Once the movant carries this burden, the burden shifts to the non-movant to show that summary judgment should not be granted. See Celotex, 106 S.Ct. at 2552-53. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2514(1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. Williams v. Weber Management Serv., 839 F.2d 1039, 1041(5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the non-moving party's position. St. Amant v. Benoit, 806 F.2d 1294, 1297(5th Cir. 1987). Bare or mere allegations are insufficient. Lodge Hall, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 106 S.Ct. at 2513. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Id. at 2513. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Ind. Co. v. Zenith Radio Corp., 106 S.Ct. 1348, 1356-1357(1986). Summary judgment is inappropriate if the evidence before the court,

viewed as a whole, could lead to different factual findings and conclusions. Honore v. Douglas, 833 F.2d 565, 567(5th Cir. 1987).

ANALYSIS

The IRS has filed a Motion for Full or Partial Summary Judgment(docket instrument #28) on its complaint to:

1) determine the tax liabilities of the defendants Ronald G. Harris and Suzette M. Harris;

2) determine that the conveyance of Tract A and B to the Harris children is void as to the IRS;

3) determine that the interest of the minor children in the property is junior to the interest of the IRS for the payment of the Harris' tax liabilities.

I

TAX LIABILITIES

The IRS alleges that Ronald G. Harris and Susette M. Harris owe an unpaid assessed tax liability to the IRS. The IRS has properly set forth and documented the Harrises tax liability in Form 4340. (Docket Instrument #28, Exhibit 11). These forms represent the unpaid balance of tax liabilities. The Forms 4340, along with the certificates of assessment and payments, establish the Harrises assessed tax liability for the years 1978 through 1982. See G. M. Leasing Corp. v. U.S., 514 F.2d 935, 941 n. 5 (10th Cir. 1975) rev'd on other grounds, 429 U.S. 338 (1977) and Brafman v. U.S., 384 F.2d 863 (5th Cir. 1967).

In addition to the assessed tax, interest and penalties, the Harris' also owe interest, penalties and other statutory

additions until the assessed amounts are paid. See 26 U.S.C. Sec. 6601.

According to both G.M. Leasing and Brafman, the IRS has conclusively established that the Harrises owe the taxes assessed here.

II

THE TRANSFER OF TRACTS A AND B WAS FRAUDULENT AS TO THE IRS

The IRS alleges that both actual and constructive fraud are present in the instant case and either would be adequate grounds for setting the conveyance aside. Actual fraud is one in which the transfer of real or personal property was intended to defraud, delay or hinder the creditor from obtaining that to which the creditor is or may become entitled and as such is void with respect to a creditor or other person. Tex. Bus. & Com. Code Ann., Sec. 24.02(a)(1968). Constructive fraud, is the transfer, gratuitous or not, made for less than fair market value, unless, in addition to the property transferred, the debtor has at the time of the transfer enough property in to pay all of his existing debts. Tex. Bus. & Com. Code Ann., Sec. 24.03(a) (1968).

The conveyance by the Harrises constitutes fraud that was both actual and constructive. It is usually difficult to find direct proof that a conveyance was made with the intent to defraud, delay or hinder creditors because such conveyances are usually made without any verbal or written expression of the of the reason for the transfer. The bad faith of the transferor must often by proved by "badges" of fraud which assist the courts in determining the transferor's state of mind. Fraudulent intent is present in the instant case and is established by the following "badges" of fraud:

1) Inadequate consideration of $1.00 was received by Susette and Ronald Harris from their children in exchange for the property. (Exhibit 44);

2) the transfer was to close relatives;

3) the newsletter of Ronald G. Harris encouraged others to place their property in the names of others to avoid the payment of taxes. (Exhibit 50.)

In addition, the quitclaim was also void as to the IRS as a result of constructive fraud pursuant to Texas Business and Commerce Code, Section 24.03(a), as it existed at the time of the signing of the quitclaim.

The quitclaim deed was a sham for Federal Tax purposes because inadequate consideration was paid by close relatives in exchange for the property. The transfer to Erin and Rebekah Harris was merely an attempt to defraud the IRS by attempting to delay or hinder the IRS from collecting the taxes owed by Ronald or Susette Harris.

The IRS alleges that the Harrises' become debtors of the IRS on each April 15th following the calendar years 1978, 1979, 1980, 1981 and 1982. Federal taxes are considered owing to the IRS as of the date the tax return for any given tax year is required to be filed. IRS v. Hickok, 356 F.2d 969(5th Cir. 1966); IRS v. Resler, 433 F.Supp. 459(S.D. Fla. 1977) aff'd 576 F.2d 650(5th Cir. 1978). This constitutes a liability of the taxpayer as of the date the return is to be filed. Therefore, the Harrises were indebted to the IRS for all the disputed taxes before May 23, 1986, the date of the quitclaim deed to their children .

In addition, it is not necessary to be an existing creditor if it can be shown that the transfer was make with the intent to defraud the United States. Colonial Leasing v. Logistics Control International, 762 F. 2d 545 (5th Cir.

1985), 458-459 in footnote 5. In the case at bar Mr. Harris' advocation of similar transfers in his newsletter clearly shows his intent to defraud the IRS as a subsequent creditor.

The tax liens of the IRS on all property or rights to property belonging to the Harrises arose at the time of the IRS's assessment of taxes for 1978, 1979, 1980, 1981 and 1982. 26 U.S.C. Sec. 6321. Since the transfer to the children was void for reasons mentioned above, the IRS tax liens attached to Tracts A and B.

III

THE NOTICES OF FEDERAL TAX LIENS CREATED A SUPERIOR INTEREST IN THE PROPERTY

Additionally, the IRS alleges that the liens for all years and tax liabilities, except Ronald Harris' tax liability for 1982 are superior to any interest claimed by the Harris children. The quitclaim deed was filed May 23, 1986 which was subsequent to the filing of the notices of federal tax liens for all years and tax liabilities of Susette M. and Ronald G. Harris except for the tax liability of Ronald G. Harris for 1982. (Docket Instrument #28, Exhibits 321, 32, 33, 35, 36, 37, and 44). Thus the notices of federal tax liens created a superior interest in the property.

CONCLUSION

The IRS has set forth and duly documented :

1) that the Harris' are liable for the assessed tax, interest and penalties as documented in Form 4340 and interest,

penalties and other statutory additions until assessed amounts are paid. (Exhibit 11).

2) that the transfer of Tracts A and B was void as to the IRS. (Exhibit 44 and 50).

3) that the notices of federal tax liens created a superior interest in the property. (Docket Instrument #28, Exhibit 31, 32, 33, 35, 36, 37, and 44).

As a result of this documentation, the IRS has informed the Court of the basis for its motion and identified the portions of the pleadings which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553(1986). The IRS has met the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Williams v. Adams, 836 F.2d 958, 960(5th Cir. 19880.

In reviewing the Defendant's Memorandum of Law in Support of the Defendant's Response in Opposition to the IRS's Motion for Full or Partial Summary Judgment, the Harrises, as pro se defendants have been given the widest possible legal interpretation. Nevertheless, they have failed to present the Court with any evidence to show that summary judgment should not be granted. Celotex, 106 S.Ct. at 2552-53.

It is therefore, ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Summary Judgment be, and is hereby granted.

The Clerk will enter this Order and provide all parties a true copy.

Signed this the 13th day of November, 1991 at Houston, Texas.

John D. Rainey
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA Plaintiff,	)))
VS.	)))Civil Action) No.H-89-2543
W.CHARLES BALTZELL AND J.W. SMELLEY, A PARTNERSHIP; ABC LAND & DEVELOPMENT CO, INC; RONALD G. HARRIS, INDIVIDUALLY; SUSETTE M. HARRIS, INDIVIDUALLY; RONALD G. HARRIS AND SUSETTE M. HARRIS AS NATURAL GUARDIANS OF THEIR MINOR CHILDREN ERIN LEIGH HARRIS AND REBEKAH ANN HARRIS, DEFENDANTS	))))))))))

AMENDED FINAL JUDGMENT

This action comes before the court on the motion of the Defendant for relief from judgment or order entered September 1, 1992, in favor of the United States of America and against Defendants, W. Charles Baltzell and J.W. Smelley, a partnership; ABC Land Development Co., Inc., Ronald G. Harris, individually, and Susette M. Harris, individually, and Ronald G. Harris and Susette M. Harris, as

Natural Guardians of their minor children, Erin Leigh Harris and Rebekah Ann Harris, pursuant to the Memorandum and Order entered November 18, 1991, granting the United States of America's Motion for Summary Judgment, the Agreed Order entered January 9, 1990, between the United States and Defendant W.charles Baltzell and J.W. Smelley, a partnership, and the Agreed Order entered January 5, 1990, between the United States of America and Defendant ABC Land & Development Co., Inc. The United States has filed a response to Defendant's Motion for Relief From Judgment or order. For good cause it is hereby

ORDERED and ADJUDGED that the September 1, 1992 motion is vacated. it is further

ORDERED and ADJUDGED that the Plaintiff, United States of America, recover of the Defendant, Ronald G. Harris, the sum of $99,195.15 as of November 18, 1991, for unpaid federal income taxes, interest, penalties and statutory additions for the taxable years ending December 31, 1978, 1979, 1980, and 1982, plus interest as allowed by law from November 18, 1991, until paid. It is further,

ORDERED and ADJUDGED that the Plaintiff, United States of America, recover, of the Defendant, Susette M. Harris, the sum of $113,552.27 as of November 18, 1991, for unpaid federal income taxes, interest, penalties and statutory additions for the taxable years ending December 31, 1978, 1979, 1980, 1981 and 1982, plus interest as allowed by law from November 18, 1991, until paid. It is further

ORDERED and ADJUDGED that the United States of America have federal tax liens securing the payment of the unpaid federal income taxes of Ronald G. Harris for the taxable years ending December 31, 1978, 1979, 1980, and 1982, and federal tax liens securing the payment of the unpaid federal income taxes of Susette M. Harris for the taxable years ending December 31, 1978, 1979, 1980, 1981 and 1982 on the following tracts or parcels of land lying in

the County of Montgomery, State of Texas, described as follows, to wit:

TRACT A

Lot 232 of Timber Ridge, Section III, a subdivision of 139.5934 acres out of the J.L. Stanley Survey Abstract 495, and the Harry Sigel Survey, Abstract 796, Montgomery County, Texas, as per plat of said subdivision recorded in Volume 9, Page 77, Map Records and believed to also be known as 3427 Dawnwood, The Woodlands, Texas 77380.

(hereinafter referred to as "Tract A")

TRACT B

Tract 101 of Kipling Oaks, Section II, an unrecorded subdivision of the E.H. Coe Survey, Montgomery County, Texas, also described as being 2.0 acres in the E.H. Coe Survey, A-158, Montgomery County, Texas, and being part of a called 140.0 acre tract conveyed A.R. Coe, Jr. described in Volume 457, Page 288: more fully described as follows:

Beginning at an iron pipe in the Coe Southeast line, S 44' 52' 18" W, 2074.5 ft. from the 140.0 acre tract east corner;

Thence: N 44 32' W, 215.5 ft. to an iron rod for corner in the Southwest end Mere Drive;

Thence: S. 45 34' W, 256.0 ft. to a point in the centerline of a branch, the South corner of Lot 182, Kipling Oaks, Section 2;

Thence: S. 23 39' W, 207.3 ft. to an iron rod in the Southeast end of Jimmy Lane;

Thence: S56 54' E,, 144.3 ft. to a 2 1/2" iron pipe in the Southeast line of the Coe Survey;

Thence: N 45 07' E, 417.5 ft. to the place of beginning and containing 2.0 acre of land and believed also to be known 1 Jimmy Lane, Pinehurst, Texas 77362 or 1507 mere Dr., Pinehurst, Texas 77362.

(hereinafter referred to as "Tract B")

It is further

ORDERED and ADJUDGED that W. Charles Baltzell and J.W. Smelley, a partnership, do not have an interest in Tract A. It is further,

ORDERED and ADJUDGED that ABC Land & Development Co., Inc., does not have an interest in Tract B. It is further

ORDERED and ADJUDGED that any interest of Erin Leigh Harris and Rebekah Ann Harris in Tracts A and Tract B is void as to the federal tax lien interest of the United States of America in Tracts A and B securing the payment of the unpaid income taxes of Ronald G. Harris for the taxable years ending December 31, 1978, 1979, 1980, and 1982, and the payment of the unpaid federal income taxes of Susette M. Harris for the taxable years ending December 31, 1978, 1979, 1980, 1981, and 1982. it is further

ORDERED and ADJUDGED the tax lien interest of the Plaintiff, United States of America, for the payment of

Defendants, Ronald G. Harris and Susette M. Harris' federal income taxes for the taxable year ending December 31, 1978, 1979, 1980, and 1982 is superior to any interest of the Defendants, Ronald G. Harris, Susette M. Harris, Erin Leigh Harris, Rebekah Ann Harris, ABC Land Development Co., Inc., and W. Charles Baltzell and J.W. Smelley, a partnership, in Tracts A and B. It is further

ORDERED and ADJUDGED that the Defendant, United States of America, may, through the Internal Revenue Service, administratively as allowed by law, seize and sale Tract A and or Tract B for the unpaid tax liability of defendants Ronald G. Harris and Susette M. Harris for federal income taxes for the taxable years ending December 31, 1978, 1979, 1980, 1981, and 1982, with the proceeds of the sale to be applied accordance to law and this judgment. It is further

ORDERED and ADJUDGED, alternatively, Tract A and Tract B may, upon motion of the United States, be ordered sold by the Court in accordance with law, with proceeds of the sale first to be applied to the cost of the sale, then to the unpaid tax liabilities of Ronald G. Harris and Susette M. Harris for federal income taxes for the taxable year ending December 31, 1978, 1979, 1980, 191 and 1982, with remainder of the proceeds, if any, to be paid over to Ronald G. Harris and Susette M. Harris as natural guardians of their minor children Erin Leigh Harris and Rebekah Ann Harris.

Signed this the 5th day of May. 1993.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2090
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

W. CHARLES BALTZELL, ET AL.,

Defendants,

RONALD G. HARRIS and
SUSETTE M. HARRIS,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas
(CA-H -89-2543)

Before Jolly, Jones, and Stewart, Circuit Judges.

Per Curiam:*

The judgment of the district court is affirmed. See Local Rule 47.6.

AFFIRMED

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not published and is not precendent except under limited circumstancesset forth in local Rule 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2090

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

W. CHARLES BALTZELL, ET AL.,

Defendants,

RONALD G. HARRIS and
SUSETTE M. HARRIS,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(April 9, 1996)

Before Jolly, Jones, and Stewart, Circuit Judges.

Per Curiam:

It is ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:
GRADY JOLLY
UNITED STATES CIRCUIT JUDGE